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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CROSSE & BLACKWELL COMPANY; CHARLES P. McCORMICK, PRESIDENT, McCORMICK & COMPANY, INC.; AND SAMUEL H. HOFFBERGER, PRESIDENT, POMPEIAN OIL CORPORATION, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The Daily Record Co., Baltimore 3, Md.

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Discussion — Commission's Brief and Recent Decision of Commission in Food Fair Case.

The Federal Trade Commission admits that the doctrine of statutes *in pari materia* does not apply to limited areas of unfair trade practices over which the Commission has been given jurisdiction by statutes other than the Federal Trade Commission Act. The Commission's brief opposing

the petition for Writ of Certiorari in discussing statutes giving the Commission jurisdiction to administer special areas involving unfair trade practices, at page 9, states:

> "Since the later statutes were passed many years after the Federal Trade Commission Act and deal with a much narrower area of unfair trade practices, they may not be *in pari materia* with the Federal Trade Commission Act."

The present case comes directly within the above text of the Commission's brief, as evidenced by an examination of the recent decision — *In the Matter of Food Fair Stores, Inc., a corporation, Federal Trade Commission Docket 6458*, decided April 11, 1957, since the filing of the petition in this case.*

In the Food Fair Stores, Inc. case, it was charged by the Commission that Food Fair Stores:

> " * * * knowingly induced and received from suppliers (petitioners) advertising allowances which those suppliers (petitioners) had not made available on proportionately equal terms to all of their other customers competing with respondent in the retail sale of such suppliers' (petitioners') products and that respondent knew this. In short, the respondent knowingly induced a violation of section 2(d) of the Clayton Act by its suppliers (petitioners)."

The issue in this case was whether Food Fair Stores was subject to the jurisdiction of the Federal Trade Commission under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, etc., as claimed by the Federal Trade Commission, or was subject to the jurisdiction of the Secretary of Agriculture under a later statute, the Packers and Stockyards Act of 1921, 7 U.S.C. 191, etc. The Hearing Examiner

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* Copy of Decision is attached to this Reply Brief.

found that the Federal Trade Commission had no jurisdiction over this matter and that the Secretary of Agriculture alone, under the later Packers and Stockyards Act, had jurisdiction in this matter.

Thus, in the present case, a later statute (Packers and Stockyards Act), passed seven years after the Federal Trade Commission Act, has excluded the Federal Trade Commission from a narrow area of unfair trade practices. To paraphrase the position of the Federal Trade Commission as set forth on page 7 of the Commission's brief:

> "Since the later statute(s) was (were) passed many years after the Federal Trade Commission Act, and deals with a much narrower area of unfair trade practices, it is not (they may not be) *in pari materia* with the Federal Trade Commission Act."

In the present case, the Commission argued (a) that Food Fair had violated the Federal Trade Commission Act; (b) that your Petitioners had violated the Clayton Act, as amended by the Robinson Patman Act, which violation was also a violation of the Federal Trade Commission Act; and (c) that *a fortiori* since both Acts were passed at or about the same time, and involved offenses violating the Federal Trade Commission Act, it followed that both Acts were *in pari materia* and that the subpoena power of the Federal Trade Commission was a part of the Clayton Act as amended by the Robinson Patman Act. While the *a fortiori* of this argument admittedly ignores the clear and unequivocal language of the Federal Trade Commission Act, its sheer absurdity in the present case is more than obvious.

The facts of the present case are as follows:

1. Food Fair has not violated the Federal Trade Commission Act;

2. Your Petitioners are not charged with a violation of the Federal Trade Commission Act;

3. The Packers and Stockyards Act has withdrawn a special area of unfair trade practices from the Federal Trade Commission Act;

4. Food Fair, if they have violated any Act, have violated the Packers and Stockyards Act.

5. Your Petitioners, if they have violated any Act other than the Clayton Act as amended by the Robinson Patman Act as alleged by the Commission, have violated the Packers and Stockyards Act.

6. Thus, the Federal Trade Commission Act has nothing to do with the case.

It therefore follows that the doctrine of *in pari materia* between the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson Patman Act, can have no application in this case. To remedy this defect, the Commission has endorsed Senate Bill 1356 which would transfer jurisdiction over unfair trade practices in the meat industry to the Federal Trade Commission from the Secretary of Agriculture. To apply the doctrine of statutes *in pari materia* in this case is to incorporate the Federal Trade Commission Act into a case where neither party is charged with a violation of the Federal Trade Commission Act.

Since the Federal Trade Commission Act has no application in this case, it follows that the rights, limitations and procedural provisions set forth in the text of the Clayton Act, as amended by the Robinson Patman Act, and the text of the Packers and Stockyards Act must determine the rights, limitations and procedures under each Act without

adding additional rights, limitations and procedures from other Acts.

Respectfully submitted,

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Filed April 11, 1957

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 6458

In the Matter of

FOOD FAIR STORES, INC.,
a corporation

INITIAL DECISION

Frank Hier, Hearing Examiner

Andrew C. Goodhope, Frederic T. Suss, and Alvin C. Edelson, counsel supporting the complaint;

Stein, Stein & Engel, by Howard Engel, Jersey City, New Jersey, Gravelle, Whitlock & Markey, by Louis A. Gravelle, and Howrey & Simon, by David C. Murchison, Washington, D. C., counsel for the respondent.

In the midst of proof taking to support the allegations of the complaint, and immediately subsequent to the issuance by the Commission of amended complaint, respondent, by counsel, moves for complete dismissal for lack of jurisdiction. Since jurisdiction can be questioned at any time and is not conferred by consent, waiver, or failure to raise the point, at any previous time, the motion is timely and proper. The ground of the motion is that respondent's acts and practices, including those challenged by the complaint herein, are in the exclusive jurisdiction of the Secretary of Agriculture because respondent is subject to the Packers and Stockyards Act of 1921, U.S.C. 191 et seq.

Respondent herein is a supermarket grocery chain of 238 stores located along the Atlantic Seaboard from New Eng-

land to Florida, selling a full line of grocery and household products including fresh and canned meat and meat products. Its gross sales were about $475,000,000 for the fiscal year ending April 28, 1956. It was organized about 1933. The charge against it in this proceeding is that it knowingly induced and received from suppliers advertising allowances which those suppliers had not made available on proportionally equal terms to all of their other customers competing with respondent in the retail sale of such suppliers' products and that respondent knew this. In short, that respondent knowingly induced a violation of section 2(d) of the Clayton Act by its suppliers.

On July 13, 1945, respondent acquired a meat packing plant at 406 Allen Street, Elizabeth, New Jersey, at which place it has since slaughtered livestock and prepared same for consumption, selling and shipping in commerce to the extent of $25,000,000, or 95,000,000 pounds, for the fiscal year ending April 28, 1956. Respondent's investment in said plant is $2,700,000. The products thereof are federally inspected and respondent is listed and licensed by the Department of Agriculture as a packer. Counsel supporting the complaint concedes that "to the extent it operates its meat packing plant in Elizabeth, New Jersey," respondent is a packer within the statutory definition set out in 7 U.S.C. 191, 42 Stat. 160, which reads as follows:

> "When used in this chapter—
>
> The term 'packer' means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) of this section, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) of this section, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) of this section, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership, or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) of this section. Aug. 15, 1921, c. 64, §201, 42 Stat. 160."

Section 406(b) of that same statute (7 U.S.C. 227, 42 Stat. 169) provides "on or after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under Section 5 of the act entitled 'An Act To create a Federal Trade Commission, to define its powers and duties, * * *' and except when the Secretary of Agriculture, in the

exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case (August 15, 1921, Chapter 64, Section 406, 42 Stat. 169; 7 U.S. Code Section 227)." The two exceptions mentioned in the above code section are obviously inapplicable to this proceeding and it will be noted that the jurisdictional exclusion is as "to any matter which by this Act, is made subject to the jurisdiction of the Secretary * * *."

The *matter* above referred to is obviously that which is contained in Section 202, 7 U.S.C. 192 of that Act which reads as follows:

Unlawful Practices Enumerated

It shall be unlawful for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing

in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a)-(d) or (e) of this section.

Obviously the above broad proscriptions include the charge of the complaint here. There follows detailed provisions for complaint, answer, hearing, decision and order by the Secretary of Agriculture with right of appeal therefrom to the United States Circuit Court of Appeals — procedure closely following that of the Federal Trade Commission (7 U.S.C. 193-4-5) and indeed there is a separate general provision (7 U.S.C. 222) adopting for the use of the Secretary of Agriculture in the enforcement of the Act, all of the implementing provisions of the Federal Trade Commission Act. It was probably this which led the Fourth Circuit Court of Appeals in United Corporation, et al. v. F.T.C., 110 F. 2d 473 to say:

> "It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture by the Packers and Stockyards Act and the Meat Inspection Act, that Congress withheld jurisdiction over packers from the Federal Trade Commission. Only confusion could result from an overlapping jurisdiction, as this case well illustrates."

On the basis of the above, counsel for respondent contends that it has an in personam immunity from supervision, investigation or correction by the Federal Trade Commission, being, by reason of its packing activities, subject in all of its operations exclusively to the jurisdiction of the Secretary of Agriculture. In a word, once in grace always in grace. Counsel supporting the complaint, on the other hand, contends that the exclusive jurisdiction of the Secretary of Agriculture is not personal, but is only as to matters given to him exclusively, and that the acts and practices of respondent challenged in the instant proceeding are not such a matter. His argument, so far as the examiner understands it, proceeds as follows:

(a) The Packers and Stockyards Act was aimed directly against the five big packers who, in 1917, handled 70.5 of all animals slaughtered under federal inspection.

(b) That these same five packers were under a 1920 consent decree forbidding them to engage in the retail distribution of grocery products including meat or meat products.

(c) That, therefore, the Packers and Stockyards Act was and is confined in its operation to slaughtering, processing, preserving, selling, and shipping meat and meat products in commerce, and does not cover the retail distribution thereof.

(d) Therefore, there was never conferred on the Secretary of Agriculture any jurisdiction whatever over the retail activities of any business coming within the statutory definition of packer, and, therefore, he has no jurisdiction over the great bulk of respondent's acts and practices.

The above quoted statutory provisions are clear and unambiguous and would seem to this hearing examiner to require no resort to legislative history for clarification. But all counsel seem to think the contrary, and quote extensively from that legislative history to sustain their conflicting contentions.

Without extensive quotations from that legislative history, it is plain therefrom that while the consent decree of 1920, which barred the five major packers from engaging in most retail operations, was in the mind of Congress in 1921, it is also clear that Congress was legislating *for all business doing any meat packing whatsoever*, that the bill was intended to reach and regulate all phases of the business of any person, firm or corporation engaged in meat packing to any extent whatever, that the problem of "unrelated activities" was squarely before Congress and thoroughly considered, that the statutory definition of "packers" in Section 201 of the Act (7 U.S.C. 191) was made designedly broad so as to include all within its terms, "whatever the ramifications of his business, and whatever the form of corporate organization adopted," or "if such person has *an interest* in a packing business, as [above] defined or if a packer has *any interest* in his business." It is apparent that Congress was not legislating in a 1921 vacuum, but was legislating for the future and for an industry, and was keenly aware of extensions into other fields, and of other firms entering into the packing field. There is no evidence in this legislative history, that the Act was intended to be confined to those whose sole or primary business was meat packing. On the contrary, the House of Representatives was pressured by the Farm Bureau to narrow the definition of "packer" to just manufacturing or preparing meats and meat products for sale — in other words, just to meat packing — but this was flatly rejected: — the expressed intention then being "to relieve from regulation (by the Secretary of Agriculture) those outside industries only when having *no affiliation* with a packer." "Affiliation" is a broad and significant word. Finally, on this point, it is most significant to this hearing examiner that in 1938 when Congress was enlarging the jurisdiction of the Federal Trade Commission by adopting the Wheeler-Lea Amendment, and then having before it the extensive hearings preceding the Robinson-Patman Act, and their disclosure of new and devious anti-competitive practices which had come to life in the intervening years, with the knowledge of backward and forward integration occurring during the 1920 decade,

was most careful to except from the new grant of additional jurisdiction "persons, partnerships or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406 (b) of said Act." This careful additional exclusion of jurisdiction, not there before and coming 18 years later in that setting, seems to this hearing examiner to refute any claim that Congress in 1921 was legislating only about five packers, was not legislating as to retail activities, or "unrelated operations." It seems a re-affirmation of a firm intent to have the Secretary of Agriculture regulate all phases of any business in whatever primary field, connected in any way, or operating to any degree, in meat packing. There is, therefore, no necessity for deciding whether the exemption is in personam or merely in rem.

This interpretation logically and inevitably leads, counsel in support of the complaint contends, to absurd results enabling any concern to choose at will the regulatory authority, by simply acquiring or divesting itself of a packing plant. Or, put more crassly, by the simple expedient of buying a load of chickens, wringing their necks, plucking their feathers and selling their carcasses in commerce, any business in the nation, even a tire or battery manufacturer, for instance, may escape regulation of its entire business by the Federal Trade Commission, whose "expertise" in the use, for instance, of brokerage, advertising allowances, service grants and other devious means of competitive favoritism, is widely recognized. Thus, in the instant case, alleged competitive discrimination in the use of advertising allowances to push such non-agricultural products as floor wax, chewing gum and cleaning fluid is left exclusively to the Department of Agriculture. No law, says counsel, should be interpreted to achieve an absurd result.

The answer, of course, is that where a law is clear and unambiguous in terms, command, and intent and where the latter is also clear from the legislative history, interpretation is uncalled for and no deciding authority may interpose his views and interpret it away from that intent, regardless of result. The responsibility for the latter, any duty to change, as well as the sole right to change, lies with

the enacting authority, Congress. That this is recognized by that body is evidenced by the recent introduction for passage by Congress of S. 1356 to confer on the Federal Trade Commission the very jurisdiction contended for here, and by the statement of its sponsor:

> "I believe it is in the public interest that Federal Trade Commission's control be extended over packers who enter into other side-line businesses — businesses which now escape such control because of United States Department of Agriculture's inaction, but whose competitors are subject to Federal Trade Commission's control. The same need for public control applies to food firms, especially food chains, which can now acquire packing plants, or a substantial interest in one, and thus escape Federal Trade Commission's supervision over their entire operations."

Despite distinctions of counsel, which are really not actual differences, the views expressed, and the language used in United Corporation, et al. v. F.T.C., 110 F. 2d 473 (C.C.A. 4) (1940) and Docket 6409, Armour and Company (March 30, 1956) are consonant with, and, it is believed, fully support the views expressed, and the conclusion reached here, and these are precedents by which this hearing examiner is, of course, bound.

Express findings on this motion then are:

1. Respondent comes within the definition of "packer" as set out in 7 U.S.C. 191, not only as to its Elizabeth, New Jersey plant but as an entity.
2. As such, the Secretary of Agriculture has exclusive jurisdiction of the acts and practices charged in the complaint to be illegal.
3. The Federal Trade Commission has no jurisdiction thereof.

It follows that the motion of respondent to dismiss should be and the same hereby is granted.

Any and all requests for time to brief further the motion are denied.

ORDER

IT IS ORDERED that the complaint and the amended and supplemental complaint in this proceeding be, and the same hereby are, dismissed for lack of jurisdiction.

FRANK HIER,
Hearing Examiner.

April 11, 1957.